IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1012 OF 2004.

Kamlesh Kantilal Paln
Residing at B/12-603 Rutu Enclave,
Anand Nagar, Ghodbunder Road,
Thane (W) ..Petitioner.

Vs

1. The State of Maharashtra

2. The Inspector
Shop & Establishment Department,
"D" Ward Municipal Corp. of
Greater Mumbai, 1 Mahapalika
Marg, Mumbai.

3. Mr. Madan,
Holding the post of
Special Metropolitan Magistrate,
Presiding at 18th Court,
At Girgaum, Mumbai-400004. ..Respondents.

Mr. Uday P. Warunjikar for the petitioner.
Ms. Rajashree M. Gadhvi,APP for the Respondent Nos. 1 & 3.
Mrs. Aliya N. Pathan for respondent No.2.

CORAM : S.C. DHARMADHIKARI, J.

DATE : 7TH OCTOBER, 2006.

P.C.

. Rule, returnable forthwith.

2. Heard Counsel.

3. By this Writ Petition under Article 227 of the

Constitution of India the petitioner is challenging an order dated 13th February, 2004, passed by the Special Metropolitan Magistrate, Girgaon, Mumbai in Case No. 895 of 1998.

4. The petitioner states that he is an employee of a partnership firm M/s C.M. Star. This partnership firm is registered with the Registrar of Firms on 28th June, 1994. The firm carries on business from office premises situate at 229, Shreeji Chambers, Opera House Mumbai-400 004.

5. The case of the petitioner before me is that from these premises another firm M/s Bhavesh Vijay Associates was also carrying on business for some time and prior to the year 2000, when it was allegedly dissolved. The partners therein were members of Sheth family. The partners consist of three ladies.

6. It is not disclosed as to what was the nature of the business of this partnership firm but it appears that the registration certificate pertaining to this firm issued under Bombay Shops and Establishment Act was not renewed after 1998. Further the name of the firm

was not displayed in Devanagari Script. In such circumstances, for the alleged violation of the provisions of Bombay Shops and Establishment Act and rules framed there under proceedings were initiated vide case No.895/1998. That case came within the jurisdiction of the Special Metropolitan Magistrate, Girgaon and therefore, listed for trial before him.

7. The petitioner is not an accused in the said case. However, when he was in the premises of his employer a chit/intimation in writing came to be handed over to him and he was told that he should remain present before the Special Metropolitan Magistrate, on 13th February, 2004 on which date the case would be taken up for final disposal. The petitioner states that he was thus forced to go to the Court and appear although, he was neither an accused nor a witness. The learned Special Metropolitan Magistrate, after the case was called out, told the petitioner that this offence is punishable with fine and since, the provisions have been violated there is nothing to be contested or submitted on the part of the accused. The petitioner states that he could not even point out to the the Court that he has nothing to do with the firm which has allegedly violated

the provisions and the rules. However, before he could utter a word, the special Metropolitan Magistrate told him that the fine would be minimum and if he goes on submitting something or arguing, the quantum may increase. In such circumstances, the case was disposed of by directing that the fine of Rs. 3600/- should be paid, which according to the petitioner, he was forced to pay within the Court premises or else he was threatened that he would be taken in custody. The petitioner therefore, had to arrange for payment of fine in court premises itself. He somehow managed to do so. According to him, his acquaintance was present in connection with another case. The monies were lent by the Friend/Acquaitance. That is how the petitioner paid the amount. It is in these circumstances, he invoked the jurisdiction of this Court to challenge the order and the proceedings.

8. It appears that this Court initially directed issuance of notice to the State Government and the State Government has taken a stand that it is the Law Ministry which issues the necessary Notification/Orders appointing Special Metropolitan Magistrate for a particular area. Thereafter, this Court directed

issuance of notices to the Municipal Corporation of Greater Bombay and the Special Metropolitan Magistrate, who are impleaded as respondent Nos. 2 and 3.

9. Mr. Warunjikar appearing for petitioner, invites my attention to the provisions of Bombay Shops and Establishment Act and the Rules therein and submits that as far as the case is concerned, the petitioner is neither the accused nor could he have been proceeded against in any manner. His relationship with the firm M/s Bhavesh Vijay Associates has not been established. Thus, there was a contentious issue in as much as the petitioner being neither accused nor in any manner representing the firm could have not been summoned and hauled up for the alleged violation or breach. The case could not have been taken up in the absence of the accused and proceeded with, so also concluded by imposing a fine. He submits that the powers to try the matter may be summary and whatever be the pressure on Trial courts, this is no way of disposing of a criminal case. A criminal case wherein ultimately a conviction is recorded and thereafter sentence imposed should be tried in accordance with law. He submits that even if

the code of criminal Procedure could not be said to be applicable in its entirety and to the extent it prescribes the procedure for the trial of summons or warrant cases, yet, principles of natural justice demand that the Court should have enquired from the Legal Assistant of the Municipal corporation present in Court and the petitioner as to how the case has been filed, what is the charge and who is in breach of the terms and conditions upon which registration is granted. These preliminary enquiries are necessary and before the learned Special Metropolitan Magistrate satisfies himself about these prerequisites he should not proceed with the case. In these circumstances, the entire trial and final order is vitiated it being contrary to law, illegal and wholly perverse. The order therefore, be set aside.

10. Mrs. Pathan appearing for the BMC, submits that all factual issues are being raised before this Court for the first time. It is inconceivable that the petitioner having no connection with the firm or its affairs accepts the intimation given to the owner by the Court of law, appears before the special Metropolitan Magistrate and does not utter a word but quitely pays

fine. She has invited my attention to an affidavit in reply filed by BMC. She has emphasised the fact that the Inspector of Shops and Establishment, D Ward of the Municipal Corporation had visited the premises and in the premises of the employer found that the registration certificate was not renewed after 1998, name board of the establishment in Devnagari script was not found displayed and the prescribed visit book was not maintained. The book was not produced on demand. He therefore, made inspection report which was forwarded to the authorities under the Act. The information sheet shows the violation of the conditions and rules The summons to the accused was issued on 20th March,1999 by the Special Metropolitan Magistrate. A copy of the summons is also annexed to the affidavit. The receipt information/chit contains the information regarding dates of hearing. On the reverse it is stated in Marathi that "the Accountant has been informed on 9th February, 2004 about the date of hearing".

11. The petitioner is Kamlesh Kashinath Palan and his name appears as the Accountant. She has invited my attention to para 7 of the affidavit and has contended that if the petitioner had no connection of whatsoever

nature with the firm then all dates and particulars as are disclosed by him would not be available with him. In such circumstances, all pleas are raised as an after thought and in any event, cannot be gone into in writ jurisdiction of this Court. Evidence will have to be led and this is not the stage for doing so. The petitioner neither objected orally or in writing on the relevant date and in such circumstances, now cannot raise a plea that he is totally innocent.

12. The Special Metropolitan Magistrate was called upon to file an affidavit. He is no longer associated with Girgaon Court. However, he has filed an affidavit on 6th June, 2006 and has contended that the petitioner has unnecessarily criticised the manner in which the Morning Court is conducted. He has pointed out that there are several matters involving petty offences which have to be disposed of within a short span of time. In such cases, due to pressure of work it is not possible to give a detailed hearing. In any event, it is necessary only when the offence or violation is not admitted. He therefore, submits that no action be taken against him. There was no threat or coercion on his part as alleged.

13. The petitioner has paid the fine and Mr. Warunjikar is not insisting upon the same being refunded. All that remains for consideration is, whether this Court can lay down any guide-lines as contended and prayed by Shri Warunjikar. His submission is that the Court below should be guided by some elementary and basic principles of equity, justice and fair play while trying cases involving petty offences. It is not as if it can give go-by to them due to pressure of work. The principles of natural justice have to be followed. None can act arbitrarily or device a procedure unknown to law.

14. To be fair to both sides since all the pleas are raised for the first time before this court and the jurisdiction conferred on this Court under Article 227 of the Constitution of India being limited it would not be proper to adjudicate and decide the same. They would require oral evidence being led and it is not possible to decide all contentions on affidavit alone. However, the Special Metropolitan Magistrates in future should guide themselves by the above elementary principles in as much as there is no harm in at least satisfying their

judicial conscience. The presiding Officer must satisfy himself at the out set as to whether the person summoned is the accused or if the accused is a Company, Firm or Association of Individuals is being otherwise represented. The person present should be called upon to disclose his identity. The presiding officer through his Court Clerk or otherwise should satisfy himself as to whether the person present is in any way connected with the establishment. If he is an employee then whether he has the necessary authority to represent the accused or that merely because he was present at the premises that he is being summoned is something which the learned presiding Officer must enquire and more so, when a dispute is raised in that behalf. If the person concerned denies his connection or the liability, so also having admitted the connection, the charge, then the learned Metropolitan Magistrate is obliged to follow at least the summary procedure prescribed in law. It is not necessary always to hold a elaborate and lengthy trial and deliver a detailed Judgment. However, his order must disclose application of mind to the basic and fundamental issues. In the present case, what has been alleged is violation of rules which have been framed under the Shop and Establishment Act. My attention is

invited to several provisions therein which are in Chapter X under the heading "Offences and Penalties". Section 52 of the Bombay Shops and Establishment Act, 1948 reads thus:-

> "(a) If any employer fails to send the Inspector a statement within the period prescribed in Section 7 or to notify a change within the period specified in section 8 or to notify the closing of his establishment under Section 9 or;
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> (b) If in any establishment there is any contravention of any of the provisions of sections 10,11,13,18,19,20, 26, 27,39,40,41, or 42 or any orders made thereunder; or
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> (c) If in any establishment any person is required or allowed to work in contravention of sections 14,15,16,17,21,22,23,24,28,29,30, or 31; or
>
> (d) If in any establishment, a child or young person or woman is required or allowed to work in contravention of sections 32,33,or 34; or
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> (e) If any employer or manager contravenes the provisions of section 51 or any employer contravenes the provisions or sections 62, or 65; or
>
> (f) If in any establishment there is any contravention of any section, rule, or order for which no specific punishment is provided in this Act.

. The employer and the manager shall, on conviction, each be punished (for each offence) with fine which shall not be less than (One Thousand Rupees) and which may extend to (Five Thousand Rupees).

Provided that, if the contravention of the provisions of sub-section (1) of Section 7 is continued after the expiry of the tenth day after conviction, the employer shall on conviction be punished with a further fine which may extend to (One hundred Rupees) for each day on which the contravention is so continued."

There are several penalties prescribed for contravention of section 12, section 18(2), Sections 24, 31, and 62. Even not making entries by employer and Manager is an offence. There is a provision for enhanced penalty under Section 56. If the Inspector is obstructed, that also is an offence under section 57. Section 58 is very important for the purpose of the present petition and reads thus:-

> (1) Where the owner of an establishment is a firm or other association of individuals, any one of the individual partners, or members thereof may be prosecuted and punished under this Act for any offence for which an employer in an establishment is punishable;
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> Provided that the firm or association may give notice to the Inspector that it has nominated one of its members who is resident in the (State) to be the employer for the purposes of this Act and such individual shall so long as he is so resident be deemed to be the employer for the purposes of this Act, until further notice cancelling the nomination is received by the Inspector or until he ceases to be a partner or member of the firm or association.
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> (2) Where the owner or an establishment is a

company any one of the Directors thereof, or in the case of a private company, any one of the share holders thereof may be prosecuted and punished under this Act or any offence for which the employer in the establishment is punishable:

Provided that the company may give notice to the inspector that it has nominated a director, or, in the case of a private company, a share holder who is resident in the State to be the employer in the establishment for the purposes of this Act, and such director or share holder shall so long as he is so resident be deemed to be employer in the establishment for the purposes of this Act, until further notice cancelling his nomination is received by the Inspector or until he ceases to be a director or share holder.

Section 59 provides for exemption of employer or manager from liability in certain cases. Section 60 deals with cognizance of offence, which reads thus:-

(1) no prosecution under this Act or the rules or orders made thereunder shall be instituted except by an Inspector and except with the previous sanction to the (District Magistrate, Additional District Magistrate,Sub-Divisional Magistrate, Commissioner of Labour, Additional Commissioner of Labour or Deputy Commissioner of Labour, or the local authority, as the case may be or without any such sanction, by an aggrieved person, or by a representative of the registered union of which the aggrieved person is a member:

Provided that any local authority may direct that the powers conferred on it by this sub-section shall, in such circumstances and subject to such conditions, if any, as may be specified in the direction, be exercised by its standing committee or by any committee appointed by it in this behalf or, if such local authority is a

municipal corporation, by its Municipal Commission. Deputy Municipal Commissioner or Assistant Municipal Commissioner.

> (2) No court shall take cognizance of any offence under this Act or any Rule or order made thereunder, unless complaint thereof is made within (three months from the date on which the alleged commission of the offence came to the knowledge of an Inspector.)

15. In the above circumstances and when the charge was for breach of the provisions of the Bombay Shops and Establishments Act, 1948, the learned Special Metropolitan Magistrate should at least find out as to whether the person is the owner of the establishment. If he is owner of the establishment or the owner is a firm or Association of individuals it is represented by a partner or any one of the individual or not and depending upon other factors it may be prosecuted and punished under this Act for any offence for which an employer of the establishment is liable. The above reproduced section contemplates that Employer or Manager of an establishment can be proceeded against for an offence under this Act. It is in such circumstances and when the Act furnishes complete opportunity to even the Manager to point out that despite due diligence the provisions could not be enforced or implemented or that the offence was committed without his knowledge and

consent that the requirement of the Presiding officer being satisfied that an offence is committed becomes crucial. It is initial satisfaction of the Inspector and thereafter a Trial into the offence and imposition of penalty is what is contemplated by the Act.

16. Mr. Warunjikar was at a pains to point that such being the nature of the proceeding it was incumbent upon the learned Special Metropolitan Magistrate to have satisfied himself after perusal of the Inspection Report and the provisions referred to above that the petitioner can be proceeded against or not. His presence in Court is not enough I see much substance in the contention of Shri Warunjikar that in so far as the trial of offences under Bombay Shops and Establishments Act, 1948 so also while imposing penalties this elementary principle will have to be borne in mind by the concerned Presiding Officer. Howsoever, summary the trial may be. There is no compulsion that it should be completed in fixed time frame or between 8.30 to 10.00 a.m. in the morning by presiding officer. The trial of even petty offence can have serious consequences. Thus, when prosecution is contemplated for even a petty offence, and illiterate persons are brought before the Presiding Officer, the

Court should be cautious. The Presiding Officer has to exercise extreme precaution while imposing fine. The order of conviction and sentence affects a person in several ways. In these circumstances and when the presiding Officer is not satisfied about the basic ingredients of the offence alleged and the complicity of the person appearing before him therein he must postpone the hearing. He can direct production of better and further particulars if the circumstances so neccessitate However, no general Rule can be laid down and everything depends on facts of each case.

17. The Presiding Officers would do well to remind themselves of the observations of the Hon'ble Supreme Court in a well known decision reported in AIR 1972 S.C. 330 (Bareilly Electricity Supply Company V. Workmen). The Hon'ble Supreme Court after referring to a earlier decision reported in AIR 1957 S.C. 882 observed, in para, 14 thus:

> An attempt is however made by the learned advocate for the appellant to persuade us that as the Evidence Act does not strictly apply the calling for of the several documents particularly after the employees were given inspection and the reference to these by the

witness Ghos in his evidence should be taken as proof thereof. The observations of Venkatrama Aiyar J. in Union of India V. Varma, 1958-2 Lab.L.J.259 at PP 263-64 = (AIR 1957 S.C. 882) to which our attention was invited do not justify the submission that in labour matters where issues are seriously contested and have to be established and proved the requirements relating to proof can be dispensed with. The case referred to above was dealing with an enquiry into the misconduct of the public servant in which he complained he was not permitted to cross-examine. It however, turned out that he was allowed to put questions and that the evidence was recorded in his presence. No doubt the procedure prescribed in the Evidence Act by first requiring his chief-examination and then to allow the delinquent to exercise his right to cross-examine his was not followed, but that the Enquiry Officer, took upon himself to cross-examine the witnesses from the very start. It was contended that this method would violate the well recognised rules of procedure, in these circumstances, it was observed at page 264:-

Now it is no doubt true that the evidence of the respondent and his witness was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by Tribunal even though they may be judicial in character. The law requires that such Tribunals should observe the rules of natural justice in the conduct of the enquiry and if they do so their decision is not liable to be impeached on the ground that the procedure followed was not i.n accordance with the which obtains in a Court of Law."

But the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examiantion by the party against whom they are subjected to be

> used. When a document is produced in a Court or a Tribunal the question that naturally arises is, is it a genuine document, what are its contents and are the statements contained therein true."

18. The presiding officers should not ignore the application of principles of natural justice. It is in that context the Hon’ble Supreme Court has laid down these established principles. All laws of procedure and even the Evidence Act, according to the Hon’ble Supreme Court, are founded on these fundamental principles. All natural Justice is Law of Evidence and procedural law. Thus whenever, the person appearing disputes the liability and denies the fact of violation or breach of the Act and Rules, the learned Presiding Officer is duty bound to satisfy himself as regards the basic features of the case.

19. The petitioner has sought to raise contentious issues before me and Mr. Warunjikar submits that he has suffered prejudicially. However, the petitioner having paid the fine after attending the proceeding/case so also there being no denial of liability no relief can be granted to him. The above observations are made as a

serious grievance is raised about the manner in which cases involving petty offences are decided. It is not necessary that in every case the above rules of procedure should be applied. However, when there is a dispute raised even regarding the basic aspects of a case then the responsibility and duty is heavier as observed above.

(S.C. DHARMADHIKARI, J.)